

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

IVAN JOHNSON,

Plaintiff,

v.

OPINION AND ORDER

12-cv-891-bbc

ROBERT TUCKWELL, PAUL SUMNICHT,
BELINDA SCHRUBBE, MARK JENSEN,
CHARLENE REITZ, JEREMY STANNECC,
BENJAMIN HILBERT, DANIEL BREMER,
BRYAN UMENTUM, BONNIE LYNN
and JERICA EAGER,

Defendants.

Pro se prisoner Ivan Johnson has filed a proposed complaint under 42 U.S.C. § 1983 in which he alleges that various prison officials at the Waupun Correctional Institution refused to give him a special diet ordered by his doctor and that he was hospitalized multiple times as a result. Plaintiff has made an initial partial payment of the filing fee as required under 28 U.S.C. § 1915(b)(1), which means his complaint is ready for screening under 28 U.S.C. § 1915A. Having reviewed plaintiff's allegations, I conclude that he has stated a claim upon which relief may be granted under the Eighth Amendment against each of the defendants, with the exception of defendant Mark Jensen. In addition, I am dismissing his claim under the equal protection clause.

Plaintiff's allegations are easily summarized. He says that he had nissen

fundoplication surgery at the University of Wisconsin Hospital in November 2010. (He does not say why he needed the surgery. According to the Mayo Clinic's website, "[f]undoplication is a surgical procedure used to treat stomach acid reflux" in which "the top part of your stomach — called the fundus — is folded and sewn around the lower esophageal sphincter, a muscular valve at the bottom of your esophagus." <http://www.mayoclinic.com/health/fundoplication/MM00791>. However, plaintiff says he did not have any ulcers or stomach erosion before the surgery.) The surgery "went well with no complications" and plaintiff was discharged on November 14, with an order from the surgeons for a "special pureed diet."

Despite these orders from his doctors, plaintiff says that most of the defendants at various times over the next four days refused to provide plaintiff the special diet, even when he complained about it. In fact, plaintiff says he did not receive *any* food until November 18, when he was given some beans and peas. Although plaintiff was not supposed to eat solid food, he ate it anyway because he was so hungry. Later that day, plaintiff began vomiting and bleeding from his rectum. Eventually, plaintiff was taken to see a prison nurse (defendant Mark Jensen) and then taken to the hospital, where doctors found that plaintiff now had ulcers and stomach erosion. Plaintiff returned to the hospital multiple times over the next few days. Plaintiff believes that all of his complications were a result of defendants' refusal to provide his special diet.

I understand plaintiff to contend that defendants violated his rights under the Eighth Amendment by refusing to provide his special diet. Plaintiff's claim may be framed in two

ways: (1) defendants failed to provide him needed medical care; and (2) defendants failed to provide him adequate food. Both claims are governed by a similar standard. A prison official may violate a prisoner's right to medical care if the official is "deliberately indifferent" to a "serious medical need." Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). A "serious medical need" may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. Johnson v. Snyder, 444 F.3d 579, 584-85 (7th Cir. 2006).

A prison official may violate a prisoners right to adequate food if the official is "deliberately indifferent" to a substantial risk to the plaintiff's health. Jaros v. Illinois Dept. of Corrections, 684 F.3d 667, 671 (7th Cir. 2012); Prude v. Clarke, 675 F.3d 732, 734 (7th Cir. 2012); Atkins v. City of Chicago, 631 F.3d 823, 830 (7th Cir. 2011). "Deliberate indifference" means that the officials are aware that the prisoner needs medical treatment or is otherwise endangered, but are disregarding the risk by failing to take reasonable measures. Forbes v. Edgar, 112 F.3d 262, 266 (7th Cir. 1997).

Thus, under this standard, plaintiff's claim has three elements:

- (1) Was plaintiff's health endangered?
- (2) Did defendants know that plaintiff's health was endangered?
- (3) Despite their awareness of the need, did defendants consciously fail to take reasonable measures to help plaintiff?

Plaintiff has stated a claim upon which relief may be granted under this standard against most of the defendants. Because plaintiff alleges that doctors ordered his special diet,

it is reasonable to infer that he had a serious medical need and that failing to provide it would endanger his health. Further, the Court of Appeals for the Seventh Circuit has held that “[d]epriving a person of food for four days would impose a constitutionally significant hardship.” Atkins, 631 F.3d at 830.

With respect to defendants’ awareness of the need, plaintiff alleges that each of the defendants (with one exception that I will discuss below) either received instructions from the hospital about his special diet or received a complaint from plaintiff about it. Finally, plaintiff alleges that none of the defendants took any action to help him get the food he needed, so it is reasonable to infer at this stage that defendants consciously failed to take reasonable measures to help plaintiff.

At summary judgment or trial, plaintiff will need to come forward with specific evidence proving each of these elements, but his allegations are sufficient at the pleading stage. In addition, if plaintiff believes that his multiple visits to the hospital after November 18 were caused by defendants’ actions from November 14-18, he will need specific evidence to prove this. Gayton v. McCoy, 593 F.3d 610, 624-25 (7th Cir. 2010). His own belief will not be enough.

I am dismissing plaintiff’s complaint as to defendant Jensen. His only alleged involvement is that he examined plaintiff on November 18 before plaintiff was taken to the hospital. Plaintiff does not allege that Jensen had anything to do with plaintiff’s special diet or that he delayed in seeking help for plaintiff once he became aware of the situation.

At the end of his complaint, plaintiff says that he believes that some of the defendants

violated his right to equal protection. However, he does not allege that any defendant treated him differently because of his race or because he belonged to a particular group and he does not allege that defendants treated him differently from any other similarly situated prisoner. To the extent plaintiff means to argue that defendants “discriminated” against him by feeding other prisoners but not him, that is simply a restatement of his Eighth Amendment claim. Accordingly, I am dismissing plaintiff’s equal protection claim.

ORDER

IT IS ORDERED that

1. Plaintiff Ivan Johnson is GRANTED leave to proceed on his claim that defendants Robert Tuckwell, Paul Sumnicht, Belinda Schrubbe, Charlene Reitz, Jeremy Stannecc, Benjamin Hilbert, Daniel Breamer, Bryan Umentum, Bonnie Lynn and Jerica Eager refused to provide a special diet or adequate nutrition to plaintiff, in violation of the Eighth Amendment.

2. Plaintiff’s complaint is DISMISSED as to his claim against Mark Jensen and as to his claim under the equal protection clause.

3. For the time being, plaintiff must send defendants a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendants or to defendants' attorney.

4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of documents.

5. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

6. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund account until the filing fees have been paid in full.

Entered this 28th day of January, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge